

Exhibit "C"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

CHARLES FRATZ,

Plaintiffs,

vs.

Case No.: 11-cv-02577 MSG

GOLDMAN & WARSHAW, P.C., ET AL

Defendant.

Oral Examination of **BARRY A. ROSEN**, held on
October 27, 2011, at the offices of Maurice & Needleman,
5 Walter Foran Blvd., Suite 2007, Flemington, New Jersey,
commencing at 10:00 a.m., before Beth Radabaugh,
Shorthand Reporter and Notary Public in and for the State
of New Jersey.



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APPEARANCES:

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ALSO PRESENT:

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ORAL EXAMINATION OF BARRY A. ROSEN

OCTOBER 27, 2011

Thereupon,

BARRY A. ROSEN,

having been first duly sworn by a Notary
Public, was examined and testified as
follows:

EXAMINATION

BY-MR. EISENBERG:

Q. May I call you Barry?

A. Sure.

Q. Okay. Barry, you and I did meet a
couple of weeks ago, didn't we?

A. A few weeks ago.

Q. And what were the circumstances of
that?

A. An arbitration in the case of
Capital One Bank N.A., (USA), N.A. versus
Charles Fratz.

Q. Okay. And your attendance at that
arbitration was in what capacity?

A. As counsel to Capital One Bank.

Q. Okay. And where was that held at?

A. In a room in court, in the Bucks



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relationship between Capital One and the user, in this case Mr. Fratz.

Q. And your GW-1, the GW-1 that you have doesn't refer in any respect or at any place when the agreement, the customer agreement was received by Goldman & Warshaw?

A. No, it does not.

Q. Can you explain how the agreement that was part of your March 29th, 2011 letter to Mr. Fratz's counsel, which was me, and was introduced to the arbitration panel became an exhibit?

MS. NEEDLEMAN: I'm going to object. He can't determine when something becomes an exhibit. That's for a court to make a determination of whether an exhibit is accepted. If you're talking about when the document was sent and when they got it, that's a different question.

Q. When did you get it?

A. I don't know.

Q. Do you have any indication or knowledge that that contract that I referenced was a part of the Fratz file?

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A. Not the Fratz file particularly, no.

Q. Well, then where did it come from?

A. It came from the client.

Q. Did it come from client, if you know, for any particular file other than the Fratz file?

A. Not that I'm -- no, it did not.

Q. It came specifically for the Fratz file?

A. No.

Q. I'm trying to determine where did Goldman & Warshaw get the copy of this customer agreement that it attached to the letter and presented as an exhibit to the arbitration panel.

A. It was sent to us by the client.

Q. But you don't know when?

A. I do not.

Q. You don't know if it was preceding 2005?

A. I don't.

Q. Do you know if that particular contract was used as an exhibit in other cases?



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A. I believe it was, yes.

Q. And do you know if this particular exhibit was just attached to other cases as a card member agreement without corroboration that it was the actual agreement given at the time of application?

MS. NEEDLEMAN: I'm going to object to the form of the question. I don't understand the question. You're going to have to repeat it.

Q. Well, let me give you some basis.

MS. NEEDLEMAN: Please.

Q. You know that we have argued that you have a 2002 application. You've testified that the credit card was issued in 2002, November 9th I think you said, and yet there's a contract -- I'm sorry, a card member or a card holder agreement that says copyright 2005. I'm trying to understand how a card member agreement dated 2005 gets attached as the operative agreement between the credit card company and the purported debtor without a document to which it may have been an amendment. In other words, all



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I see is a card member agreement dated 2005. I'm trying to understand how that gets attached as the operative terms and conditions governing the relationship between client -- between debtor and creditor three years after the application has been signed and approved. Can you explain that?

MS. NEEDLEMAN: Well, I'm going to object to the question because that's a question directed to Capital One, but Barry --

MR. EISENBERG: I'm directing it to him.

MS. NEEDLEMAN: Well -- all right. If you can answer the question, Barry. Note my objection.

A. I'm not sure what the question is. I understand what you're trying to achieve, but I don't know what question you've asked me.

Q. It basically is how does a 2005 card member agreement get attached to a list of exhibits asserting that it is the governing agreement between debtor and creditor going

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back to a transaction that was 2002?

A. Well, you're asking me to explain something as opposed -- and you'll forgive me, but I think you're asking me to explain something as opposed to asking me a question about it, and I'm not sure where -- I'm not sure what I'm supposed to be answering at this point.

Q. How did the 2005 agreement get assigned by Goldman & Warshaw as an exhibit purporting to govern the relationship of a 2002 relationship?

MS. NEEDLEMAN: Objection to form. If you can answer.

A. We were so instructed by our client.

Q. Okay. So Capital One gave you this document and said to you, I'm asking you a question, this is the agreement that you have to attach as the exhibit; is that correct?

A. They didn't say anything about attaching it as an exhibit. In other words, I don't know that they know how -- my guess is they don't know anything about Rule 1305 in Pennsylvania. We received instructions

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that this was the agreement to use in certain cases, in certain instances.

Q. Do you have evidence of any communication that gives this instruction?

MS. NEEDLEMAN: I'm going to object to the question. The question is about the Bucks County complaint. You're asking for communication between my client and Capital One, which is outside the scope of the deposition.

MR. EISENBERG: Are you instructing him not to answer?

MS. NEEDLEMAN: He can answer the question. Note my objection.

THE WITNESS: I would like to talk to you before we --

MS. NEEDLEMAN: You can't. You're under oath.

THE WITNESS: Okay. That's not my understanding, but okay.

MS. NEEDLEMAN: I'd love to, but I can't.

THE WITNESS: That's okay.

MR. EISENBERG: Off the record.

(Whereupon, a discussion held off the record.)

BY-MR. EISENBERG:

Q. Go ahead.

A. We received -- what's your question?

MS. NEEDLEMAN: You know what, excuse me one second. Can we just take a break because I want to talk to Mr. Warshaw, who is not under oath.

MR. EISENBERG: Sure.

(Whereupon, a brief recess taken.)

MS. NEEDLEMAN: Okay. Thank you for the two-minute indulgence.

MR. EISENBERG: Can you read that back, please. I know you can. Will you read it, please.

(Whereupon, Record read.)

A. We have -- there is a memo. Now, I don't know whether --

THE WITNESS: Has counsel been provided that memo?

A. So, yeah, there is a memo by which we were instructed to use this particular terms and conditions or user agreement, if

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you will, for files -- for accounts that were open prior to July 1, 2008 and charged off after April 1, 2005.

Q. Okay.

A. This file fell into that rubric in that it was commenced prior to July 1, 2008 and was charged off after April 1, 2005.

Q. Okay. So that explains.

Is the responsibility -- strike that.

MR. EISENBERG: And I need to ask a question that does have to do with policy but I'll try to relate it specifically to the Bucks County agreement.

MS. NEEDLEMAN: Um-hmm.

Q. Does your file reflect any attorney's responsibility for reviewing the Bucks County case before it was filed?

MS. NEEDLEMAN: Objection as to outside the scope and I'm not quite sure of the question. Maybe just rephrase it a little bit.

MR. EISENBERG: Well, let me -- let me ask that that question either be stricken or just ignored.

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Q. Let me take it up to the time of February 2011 when you sent that letter with regard to the exhibits that were going to be presented at arbitration. Did you review --

A. The letter was in March.

MS. NEEDLEMAN: It was in March.

Q. March 29th. I'm sorry. Okay. Did you review all those documents to ensure that they were appropriate and accurate?

A. I reviewed the documents.

Q. Okay. Did you review the application, if you remember?

A. I reviewed the application.

Q. Okay. Did you note the date of the application?

A. I believe I noted it on the letter, but -- of March 29th. I usually do.

Q. Okay.

A. But I would have to look at it.

Q. All right. And the letter is attached to Fratz 3 I believe.

A. Here, I have it.

Q. You have it?

A. It does not reference the date in

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the letter.

Q. Okay.

A. However, I would have reviewed the -- to answer your question, yes, I would have reviewed the document prior to sending it out.

Q. Would you have reviewed the card member agreement as well?

A. I may not have reviewed it specifically for that. I had seen it before and was pretty well familiar with it.

Q. So you don't recall whether or not you would have noted that it said copyright 2005; is that correct?

A. I don't recall when I became aware of it.

Q. Okay. Now, let's go to the date of the actual arbitration in Bucks County of this particular case, and I referenced it when I started the deposition today. You recall that, yes?

A. I do.

Q. Okay. When you attended that arbitration, were you aware of the case that

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2 is the basis for the current deposition, that
3 is to say the case represented by Fratz 3 in
4 the United States District Court?

5 A. I was aware of that case, yes.

6 Q. Were you aware at that time that the
7 complaint basically attempts to attack the
8 2005 card member agreement as inappropriate
9 for a 2002 application?

10 A. Yes.

11 Q. Okay. But nonetheless, you went
12 ahead and presented the 2005 agreement and
13 the 2002 application as an exhibit at the
14 arbitration; isn't that correct?

15 MS. NEEDLEMAN: I'm going to object.
16 I mean there's an inference that he shouldn't
17 have just because you made it a defense. I
18 don't -- I don't understand that question and
19 I don't know if that's appropriate.

20 MR. EISENBERG: Let me rephrase it.

21 MS. NEEDLEMAN: Yeah, please.

22 Q. When you attended as counsel for
23 Capital One the arbitration on -- and I
24 don't have the date. I just have to find
25 that.

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MS. NEEDLEMAN: October 11th.

Q. -- October 11th, you were aware that there was a complaint in Federal Court, were you not, brought by Mr. Fratz against Goldman & Warshaw?

A. I was aware.

Q. And what was your understanding or what is your understanding of the context of that complaint?

A. The context of the complaint?

Q. Yeah.

A. I'm not sure what you mean by the context.

Q. What were the facts that --

A. The allegations?

Q. Yes, the factual allegations of the complaint.

A. The one that I am aware of is that the agreement is somehow rendered -- or the user agreement or terms and conditions is dated 2005 and therefore those terms and conditions could not have applied to a case which originated -- to a credit card case or account that originated in 2002.



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Q. Okay. And you were aware of that at the arbitration?

A. I was aware of the allegation, yes.

Q. Okay. Do you disagree with that allegation?

A. Yes.

Q. Why?

MS. NEEDLEMAN: Objection, irrelevant. Irrelevant. You don't have to answer that.

MR. EISENBERG: Are you instructing him not to answer?

MS. NEEDLEMAN: I'm instructing him not to answer. I mean you know what our defenses are. They're pretty well laid out in our answer to the Federal Court case. Mr. Rosen's opinion about this case is irrelevant.

MR. EISENBERG: Okay.

Q. Do you agree that the Capital One versus Fratz case in Bucks County was a breach of contract action?

A. Yes.

Q. Okay.

(Whereupon, a pause on the record.)



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MR. EISENBERG: All right. I'm just going to need a few minutes just to go over -- we don't have much longer.

MS. NEEDLEMAN: Take your time.

Q. Actually before I start my review of what I've got left, I want to show you that which I'm going to ask be marked GW-3.

(Whereupon, Exhibit GW-3, docket entries for Bucks County, is marked for identification as of this date.)

Q. Do you know what GW-3 is? It's right in front of you.

MS. NEEDLEMAN: This is the Bucks County --

Q. Here's the actual marked exhibit.

A. Okay. They're all the same. I didn't know that's what you were referring to.

Q. Yeah, I'm sorry.

A. Are you asking if I know what it is?

Q. Yes.

A. It's a -- yes. It's docket entries in Bucks County for the case of Capital One

Bank (USA) N.A. versus Charles J. Fratz.

Q. Now, would you please look at the last docket entry dated February 11, 2011 and read that into the record.

A. "Arbitration award in favor of plaintiff in the sum of \$4,597.51."

Q. Same day?

A. Yeah. "Notice of entry of award mailed on 10/12/2011."

Q. Was this the amount that you sought as an award?

A. When you say sought the award --

Q. Well, the wherefore clause in the complaint against Charles Fratz brought by Capital One in Bucks County has a prayer for \$6,813.20.

A. And is it that same number?

Q. Yes.

A. No, it's not the same number.

Q. Do you know why there's a disparity here between the amount of your prayer and the amount awarded?

A. Because the arbitration panel saw fit to enter a different number.



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Q. Do you have any reason to know why?

A. No, they don't disclose that.

MR. EISENBERG: I'm going to ask that this be marked G4. GW-4, excuse me.

(Whereupon, Exhibit GW-4, Answer to Plaintiff's Complaint with Affirmative Defenses, is marked for identification as of this date.)

MR. EISENBERG: I may not use -- let me go off the record.

(Whereupon, a discussion held off the record.)

MR. EISENBERG: I am going to use it.

Q. I want you to take a look at first Fratz 3, paragraph 40, and the part of Fratz 3 that I want you to look at is the class action complaint and civil action.

MS. NEEDLEMAN: I'm sorry, Stuart, what paragraph?

MR. EISENBERG: Forty.

MS. NEEDLEMAN: Forty?

MR. EISENBERG: Yes, and while we're waiting, I'll read it into the record. "The



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evidence includes a contract represented as the operative contract," there's a misspelling of operative, "but which is clearly not the operative contract. See paragraphs 8 through and including 12 above."

Q. Do you see that?

A. I see paragraph 40, yes.

Q. And do you agree with that which I read into the record?

MS. NEEDLEMAN: Objection. It's a conclusion of law.

A. You're asking me if that's what it says or do I agree with --

Q. Do you agree that I read into the record that which it says?

MS. NEEDLEMAN: The complaint speaks for itself. Paragraph 40 speaks for itself.

MR. EISENBERG: Well, he can agree that it's what I read into the record.

MS. NEEDLEMAN: That's all I'm going to say.

A. Yeah, I believe so, yes.

Q. Okay. The answer by Goldman & Warshaw in GW-4 at paragraph 40, would you

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read that into the record.

A. The answer to paragraph 40?

Q. Yes.

A. "The allegations of this paragraph are denied in their entirety."

Q. Why?

A. I didn't write this. So I didn't review it until, you know, I'm sure before it was filed. So I'm not sure I'm qualified to give an answer, but I suppose -- it appears that we're denying the -- there are more than one allegation in paragraph 40 and they are both incorrect.

Q. Okay. Is it your testimony now that the contract that's been discussed, the card member agreement that we've discussed throughout this deposition was not represented by Goldman & Warshaw as the operative contract between creditor and debtor, Capital One and Mr. Fratz?

MS. NEEDLEMAN: Objection.

A. That's not what the letter -- first of all --

THE WITNESS: I'm sorry.



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MS. NEEDLEMAN: Note my objection.

A. That's not what paragraph 40 says.

Q. Paragraph 40 says "The evidence includes a contract," which is the contract with the copyright 2005, "was represented as the operative contract." Do you not believe that that contract, the card member agreement which has been the subject of discussions throughout this deposition was not represented by Goldman & Warshaw as the operative contract between the plaintiff and defendant in the Bucks County case?

MS. NEEDLEMAN: I have to object because of the form of the question. It's a double negative. So I'm just confused. Can we try to break it down as simple as possible --

MR. EISENBERG: Sure.

MS. NEEDLEMAN: -- so we can get what you need to say and my client can answer.

Q. You represented -- strike that.

You submitted as evidence to the arbitration panel a card member agreement for



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what purpose?

A. For the panel to consider when -- as evidence when rendering their decision.

Q. Evidence of what?

A. Evidence of the terms and conditions.

Q. Of what?

A. Of the credit card, the terms and conditions applicable to the credit card.

Q. As the operative agreement between Fratz and Capital One for the issuance of the credit card or accompanying the issuance of the credit card?

A. As the agreement that would apply in that circumstance, yes.

Q. Okay. Do you stand by that testimony, that the 2005 agreement was the operative agreement?

A. I have no --

MS. NEEDLEMAN: I'm going to object for a second. Do you mean does Goldman & Warshaw stand by it or does Capital One? I mean are you asking him as a 30(b)(6) for Goldman & Warshaw?

MR. EISENBERG: I'm asking him as a



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representative of Goldman & Warshaw, yeah,
not Capital One.

MS. NEEDLEMAN: Okay. I just want
to be clear.

A. Our instructions from Capital One are
that this is the terms and conditions
applicable to this contract.

Q. All right. As the attorney for
Capital One is it your determination that
this 2005 agreement was the operative
agreement covering the issuance of the credit
card to Charles Fratz?

A. Well --

MS. NEEDLEMAN: I'm going to object.
I mean you're asking him now for his
attorney analysis of this case, which was an
analysis that he had discussed with his
client. So we're kind of getting into
attorney/client privilege here. You're
skirting it. You're really skirting it
because you're asking for his legal analysis
of what he concluded and that involved a
discussion with his client.

MR. EISENBERG: The law of



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Pennsylvania requires that an attorney review documents in good faith before submitting them to the court.

MS. NEEDLEMAN: It might, but that's not the claim here. The claim here is that its admission was --

MR. EISENBERG: Well, it's his responsibility --

MS. NEEDLEMAN: -- an E2A claim and an E claim.

MR. EISENBERG: What I'm claiming -- what I'm asserting is it's his -- I'm not asserting it in here. I'm asserting it is his responsibility to have reviewed these documents when they were submitted.

MS. NEEDLEMAN: But you haven't asserted a claim in your complaint about that. That's the problem, and now you're going not only beyond the deposition, you're going beyond the four corners of the complaint.

MR. EISENBERG: Well --

MS. NEEDLEMAN: So if there's a way you can fashion this to get within the



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parameters of why we're here, you can ask him any question you want, but when you start to go beyond that, I'm going to have to object.

Q. How long have you been practicing law?

A. Since 1985.

Q. Is it your opinion as an attorney practicing I believe with Goldman & Warshaw for three years and preceding with other law firms, that the 2005 agreement is the operative agreement? Easy. It's either a yes or a no.

MS. NEEDLEMAN: Note my objection. Note my objection. If you can answer the question.

A. Capital One is a fairly sophisticated client. They're fairly hands on. They review documents. If they instruct me in this instance that this -- these terms and conditions are applicable to this file, then I accept that.

Q. Okay. Take a look -- wait. I may not even...



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(Whereupon, a pause on the record.)

Q. Sir, look at paragraph 41 of Fratz 3 and read it into the record, please.

A. "The evidence proffered by defendants is clearly intended to represent the governing contract between the parties."

Q. And the answer to the complaint in GW-4?

A. Admitted.

MR. EISENBERG: I have no further questions.

MS. NEEDLEMAN: I have a few.

EXAMINATION

BY-MS. NEEDLEMAN:

Q. Barry, at the arbitration, did Mr. Fratz appear?

A. No, he did not.

Q. And what was the explanation for him not being able to appear?

A. The explanation I was given was because he had to work.

Q. And was that from Mr. Eisenberg?

A. It was.

Q. Okay. Did Mr. Eisenberg argue that



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